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In the

Supreme Court of the United States

October Term, 1971

No. 71-974

MARY DANIEL CONRAD, EXECUTRIX OF THE ESTATE OF GROVER C. CONRAD, DECEASED, and MARY DANIEL CONRAD, INDIVIDUALLY,
Petitioner,

v.

RUBY WANDA JUDSON, ET AL,
Respondents.

On Petition For A Writ of Certiorari To The Court of Civil Appeals For The Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The Supreme Court does not have jurisdiction over this matter. Petitioner did not properly raise any point regarding a Federal constitutional issue in the state courts.

A careful reading of Petitioner's foggy section on "How the Federal Question was Presented in the State Court" (Petition 10-12) leads to the inevitable conclusion that Petitioner has failed to comply with Supreme Court Rule 23(1)(f). In fact Petitioner cannot meet the requirements

of Rule 23(1)(f), because she never specifically or timely raised a Federal constitutional issue in the trial court, in the Texas Court of Civil Appeals, or in the Texas Supreme Court.

Federal constitutional issues must be *distinctly* stated in the state court. *New York Central & H. Ry. v. City of New York*, 186 U.S. 269, 273, 46 L. ed. 1158, 1160 (1902); *F. G. Oxley Stave Co. v. Butler Co.*, 166 U.S. 648, 655, 41 L. ed. 1149, 1151-52 (1897). However, none of Petitioner's motions for rehearing (Tr. 187, 195) or assignments of error preceding or including Petitioner's "Motion for Rehearing" in the Texas Supreme Court mention or even allude to a denial of federal constitutional rights. Hence Petitioner's argument on pages 10-12 of the Petition that she "preserved" any such federal question in the state courts is fallacious.

Only in a document labeled "Petitioner's Second Motion for Rehearing on Application for Writ of Error" (Petition 12-13) did Petitioner, through one of her many counsel, ever "focus" on a specific Federal constitutional issue. Yet Petitioner misleads this Court by failing to state, on pages 12-13 of her Petition, that such "Second Motion for Rehearing" *was never filed in the Texas Supreme Court* and hence never passed on by that Court.

As the record of proceedings in the Texas Supreme Court shows, Petitioner filed a "Motion for Leave to File Second Motion for Rehearing" in that Court after the Court had already overruled her regular Motion for Rehearing. The Texas Supreme Court, on December 1, 1971, overruled that motion for leave to file the "*second*" motion for rehearing

(Petition E-1), the obvious reason being that the Texas Rules of Civil Procedure only provide for *one* Motion for Rehearing (Rule 515 TRCP: "*A* motion for rehearing may be filed * * * after * * * the order refusing an application for writ of error.") Thus, Petitioner's Second Motion for Rehearing, the only document in which a Federal constitutional point was raised, was a nullity under state procedure and was never filed in the highest state court. The constitutional issues were therefore never before any Texas Court for consideration.

The constitutional issues not being raised in the Texas courts at any level of the proceedings, this Court has no jurisdiction over such issues now. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128-29, 89 L. ed. 2092, 2100 (1945); see *Cardinale v. Louisiana*, 394 U.S. 437, 439, 22 L. ed. 2d 398, 400 (1969).

Even if Petitioner's "Second" Motion for Rehearing had been filed and acted on by the Texas Supreme Court, as Petitioner implies, that was too late to voice those issues for this Court to consider on certiorari. As Justice Harlan held in *Bloeth v. State of New York*, U.S. , 7 L. ed. 2d 780, 781 (1962):

> It appears in the face of the present application that the two questions proposed for review were not raised in the [New York] Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them.

See *Herndon v. Georgia*, 295 U.S. 441, 443-44, 79 L. ed. 1530, 1532-33 (1935) (on appeal).

For yet another reason this Court is without jurisdiction. Texas practice requires that all alleged errors of law by an appealing party be specifically raised in a timely filed motion for new trial in the trial court. Rules 320-324 TRCP (App. A). The alleged errors must also be preserved distinctly in such party's points of error in both succeeding appellate courts. Rules 374, 458, 469 (c) TRCP (App. B). But Petitioner did not so preserve any alleged federal constitutional errors at any stage of the Texas appellate process. This Court has held many times it will respect such state procedural rules, and not allow them to be skipped over by a last-minute federal constitutional allegation made solely to attract this Court's attention. *Beck v. Washington*, 369 U.S. 541, 551-54, 8 L. ed. 2d 98, 108-09 (1962); *In Re Lampkin*, 355 U.S. 59, 2 L. ed. 2d 107 (1957); *Williams v. Georgia*, 349 U.S. 375, 382-83, 99 L. ed. 1161, 1170 (1955).

For the preceding several reasons, Petitioner has failed to invoke the jurisdiction of this Court, and her Petition should be denied. The remainder of this Response is unnecessary to consider in the light of such obvious lack of jurisdiction and is presented solely to state a second fatal threshhold defect in Petitioner's position.

QUESTION PRESENTED

Apparently Petitioner is presenting the question of whether the particular application of Texas procedure and law to largely undisputed facts in this case constituted a denial of trial by jury contrary to the due process and equal protection clauses of the Fourteenth Amendment. (Petition 4-5).

STATUTE AND RULES

In addition to the constitutional and statutory provisions cited on Page 5 of the Petition, if this Court is to determine whether the Texas court procedures in this case violated any federally protected right of trial by jury, the Court must consider several other statutory provisions that formed the basis for the procedures followed and the results obtained by the Texas courts. Such statutes (or rules having the force of statutes) are:

§ 8, art. 6132b, Texas Revised Civil Statutes (the Texas Uniform Partnership Act, herein "TUPA") (App. C)

Rule 172, Texas Rules of Civil Procedure, (herein "TRCP") (App. D)

STATEMENT

Respondents do not agree that Petitioner's "Statement" accurately or fully depicts the facts and rulings that bear on the alleged constitutional issues. However, since Respondents are continuing this brief solely for the purpose of urging an additional threshold question which Petitioner fails to resolve, Respondents elect to point out only such facts as are omitted by Petitioner but which are critical to the other threshold question.

In addition to the relief described on pages 5-6 of the Petition, Respondents asked the Texas trial court to declare the Lake Ranch properties to be partnership assets, or in the alternative to exercise its equitable powers and order them held by Petitioner as a constructive Trustee for the benefit of the *et al* partners, and further to exercise the

court's equitable powers in winding up and liquidating the affairs of the partnership under § 37 TUPA. (Tr. 138-46)

Supplementing the jury findings reported by Petitioner (Petition 3-4), the trial court had before it as *conclusive, undisputed* evidence, a twenty-two page Audit (Pl. Ex. 2, S.F. 4, 57) * prepared and filed by a court-appointed auditor. Among other things, that Audit showed in seven legal-sized fold-out pages that from 1951 through 1964, some $137,868.28 of partnership funds were invested in Lake Ranch, some in purchase money, some in up-keep and improvements. (Audit 13-19) From 1959 through 1962 an additional $48,264.73 in partnership funds was invested. (Audit 9-12) The Audit also disclosed that Grover Conrad, the managing partner, had taken the Lake Ranch for his personal investment by charging to his capital account the *et al* funds, invested in Lake Ranch and by charging a $48,264.77 "Lake Ranch Receivable" account to his capital account in late 1962. (Audit 2-4) The latter Conrad did at a time when his capital account was in an over-drawn position. (Audit 3)

The trial court also had before it uncontradicted evidence that the partnership's credit and collateral had been used from 1950 through 1963 to finance the purchase of Lake Ranch, (Pl. Ex. 37-45, S.F. 98, 112; S.F. 34-35, 133-34), and that a schedule (No. 15) to the partnership's 1961 U. S. Income Tax return, signed by Grover Conrad, showed Lake Ranch as a partnership investment. (Pl. Ex. 15, S.F. 107-08)

* Such Auditor's report is hereinafter simply referred to as "Audit" followed by the appropriate page number therein.

Petitioner, at the trial, offered no evidence relating to Lake Ranch, made no requests for issues to the jury relating to Lake Ranch, and even refused, contrary to a subpoena, to bring to court the records in her possession relating to Lake Ranch. (Pl. Ex. 51, S.F. 209-10)

Both the Texas appellate courts held, contrary to Petitioner's points of error, that there was sufficient evidence to support the trial court's ruling that Lake Ranch was a partnership asset.

The Texas Court of Civil Appeals held on the basis of the jury findings and the Audit, coupled with the other uncontradicted evidence in the record, that § 8, TUPA, along with Texas case law, supported the trial court's legal conclusion that Lake Ranch was partnership property (Petition A-7). That court held it was Petitioner's burden at that point to show otherwise, and that Petitioner failed to do so. (Petition A-7) Hence, the court concluded, it was appropriate to divest Petitioner of naked legal title to Lake Ranch, since equitable title was in the partnership, and order it conveyed to an appointed surviving partner. (Petition A-7, A-10) The Texas Supreme Court refused to disturb those rulings. (Petition C-1)

ARGUMENT

Whatever be Petitioner's precise constitutional issue relating to an alleged deprival of a jury trial under the Texas system and law, as applied in this non-federal question situation, Petitioner has a threshold duty to show some evidence of fundamental unfairness in the Texas procedures

contrary to the due process clause, and not just an error in local procedure. *United Gas Public Serv. Co. v. Texas*, 303 U.S. 123, 139-41, 82 L. ed. 702, 714-15 (1938); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. ed. 674, 677 (1934). Anything short of that is not within the purview of the Court, and would put the Court in the business of reviewing the alleged procedural errors of all state courts in their application of purely local law. Fortunately, this Court has rejected that role. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 22 L. ed. 2d 398, 400 (1969); *United Gas Public Serv. Co. v. Texas, supra*, at 714-715.

The cases cited by Petitioner for the proposition that this Court will review state jury trial procedures in such situations are wholly inappropriate. All involved a state court's enforcement of a right granted the complaining party by a *federal* statute. Thus, *Baker v. Texas & P. Ry.*, 359 U.S. 227, 3 L. ed. 2d 756 (1959) and *Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360, 1 L. ed. 2d 889 (1957) represent a narrow line of cases involving state enforcement of federally-given rights, principally in the FELA area, that are an exception to the rules enunciated in *United Gas Public Serv. Co. v. Texas, supra*, and the other cases cited above. See Wright, Fed. Courts § 45 (1963 Ed.). Petitioner cites *no* applicable authority indicating that this Court will review state court procedural matters in a civil state-law case.

Even if there were jurisdiction over this matter, and without regard to the argument on the merits of whether Texas can or did "deprive" Petitioner of a jury trial in any respect, Petitioner does not raise *any hint* of fundamental

unfairness in the Texas court decisions in this matter. Petitioner cannot hurdle such additional prerequisite in this non-federal question for at least the following reasons:

(a.) Rule 172 TRCP (App. D) gave the unchallenged Audit report the status of *conclusive* evidence at the trial, thereby obviating the need for jury findings on any evidence in that report. *Kempner v. Galveston Co.*, 76 Tex. 450, 13 S.W. 460 (1896); *Griffin v. Sevier*, 234 S.W. 2d 272 (Tex. Civ. App., Galveston, 1950), *no writ*. The Audit alone furnishes adequate evidence that Lake Ranch began and continued as a partnership asset, yet Petitioner does not attack Rule 172 as lacking in due process. Indeed, she cannot, for *she* failed to follow clear state procedure, in Rule 172, in objecting to the Audit prior to trial, if she disagreed with it.

(b.) Lake Ranch was shown as a partnership asset on the *et al* books at times and was stated to be a partnership "investment" on the 1961 *et al* U. S. Tax Return. (Pl. Ex. 15, S.F. 107-08) It was *undisputed* that the books were kept and the return prepared by Conrad, the managing partner, or his accountants. (Petition A-7) On this basis alone, the Texas courts were justified in finding Lake Ranch a partnership asset and awarding title and possession to the surviving partner for the benefit of all who were entitled to participate in partnership assets. There was nothing for a jury to find on such undisputed evidence.

(c.) Section 8(2), TUPA, provides: "Unless a contrary intention appears, property acquired with partner-

ship funds is partnership property." The Texas Court of Civil Appeals affirmed the trial court's application of that statutory legal principle to the undisputed facts in the Audit, the books, and the 1961 tax returns, in holding Lake Ranch a partnership asset. Petitioner offered no opposing evidence and requested no issues to the jury negating such clear evidence, (A-7) Obviously Petitioner, under these facts, cannot and does not claim § 8(2), TUPA, as applied, is unconstitutional. Yet, it alone authorized the lower court's actions without the necessity of additional jury findings.

(d.) Based on § 8(2), TUPA, and long-standing Texas case law that a managing partner like Conrad is under a duty analogous to a Trustee, in relation to his partners, the Texas Court of Civil Appeals held (following other Texas case law) that it was Petitioner's burden to dispel all doubts about Conrad's dealings with his partners, and further that if she failed in such burden, all doubts were to be resolved against Conrad. (Petition A-7) Petitioner, being Conrad's wife and also his representative for this litigation, was charged also with the burden of producing evidence as to the amount of any claimed investment of her monies in Lake Ranch. (Petition A-10) On these additional grounds alone, the courts were justified in finding Lake Ranch to be partnership property, and in divesting Petitioner of record title, since Petitioner not only failed to carry her burden, as Conrad's successor in interest, *but she personally refused to bring the only pertinent records*

in court, which could have ever shed any light on her claim to ownership. (Pl. Ex. 51, S.F. 209-10). Clearly, Petitioner cannot, and does not, claim that § 8(2) TUPA, and the Texas cases cited, coupled with her own defiance of the judicial process, unconstitutionally deprived her of a jury trial.

In summary, Petitioner has not only failed to show jurisdiction in this Court for review of the alleged constitutional issues, but has failed to raise any smattering of fundamental unfairness in the Texas courts' procedures, rulings relating to burdens of proof, or applications of substantive law in this case.

Respondents strongly disagree with Petitioner's rambling discourse and misleading insinuations about the evidence, the rulings by the various lower courts, and the status of Texas substantive law contained in the section entitled "Reasons for Granting the Writ" on pages 13-27 of the Petition. However, to avoid prolonging this brief when it is apparent that Petitioner has neither shown jurisdiction in this Court nor fundamental unfairness in the state rules of procedures and burdens of proof, Respondents withhold all comments and argument as to the correct state of the evidence, the lower court decisions, and present Texas law. Respondents would respectfully point out to the Court that Petitioner directed her entire Petition for Certiorari "only to that part of the jurgment holding that the real estate was an asset of the partnership and divested Petitioner of all her title to said land." (Petition 4) From that point forward, however, Petitioner devotes a majority of her brief

to matters and assertions totally extraneous to that point, which matters dealing with the local law and procedure are now final. *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 139, 82 L. ed. 702, 714 (1938).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 1972, a copy of the Brief for Respondents in Opposition was mailed, postage prepaid, in accordance with Supreme Court Rule 83(1), to Harvey L. Davis, Esq., 3315 Daniel Street, Dallas, Texas 75205, counsel for Petitioner. I further certify that all parties required to be served have been served.

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APPENDIX A

Texas Rules of Civil Procedure

Rule 320. Motion

New trials may be granted and judgment set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall be in writing and signed by the party or his attorney and shall specify each ground on which it is founded, and no ground not specified shall be considered.

Rule 321. Form

Each ground of a motion for a new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such way as that the point of objection can be clearly identified and understood by the court.

Rule 322. Generality To Be Avoided

Grounds of objections couched in general terms — as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like — shall not be considered by the court.

Rule 323. Grounds of Motion in Causes Tried Without Jury

When the case is determined by the judge without a jury, if a motion for new trial is filed, counsel shall specify succinctly the supposed errors of law or of fact, or both, into which the judge has fallen, as far as may be practicable to do so.

Rule 324. Prerequisites of Appeal

In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal. * * *

APPENDIX B

Texas Rules of Civil Procedure

Rule 374. ASSIGNMENTS OF ERROR

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. * * *

Rule 458. MOTION AND SECOND MOTION FOR REHEARING

Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, within fifteen days after the date of rendition of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, whether such date be in the same or a succeeding term of said court, file with the clerk of said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record. * * *

Rule 469. REQUISITES OF APPLICATION

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

APPENDIX C

TEXAS UNIFORM PARTNERSHIP ACT (Art. 6132b, Tex. Rev. Civ. Stat.) § 8(2)

§ 8. Partnership Property

Sec. 8(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

APPENDIX D

Texas Rules of Civil Procedure

Rule 172. AUDIT

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Said report shall be admitted in evidence, but may be contradicted by evidence from either party where exceptions to such report or of any item thereof have been filed before the trial. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.